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STATUTES OF WEST VIRGINIA.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1916

No. 64

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A CORPORATION, Plaintiff in Error,

vs.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

REPLY BRIEF OF THE CHESAPEAKE & OHIO RAILWAY COMPANY TO BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA.

STATEMENT.

The Public Service Commission, in reply to the brief of The Chesapeake & Ohio Railway Company, heretofore filed, claim that the Public Service Commission of West Virginia did not **erroneously** construe and apply Section 4 of Chapter 9 of the Acts of the West Virginia Legislature; and

2nd. That the order of the Public Service Commission is reasonable and consistent with the Constitution of the United States, and while not controverting the claim of The Chesapeake & Ohio Railway Company that a carrier of passengers cannot be compelled to carry freight, controvert the converse of the proposition and hold that a carrier of freight only can be compelled to carry passengers, basing their contention upon the fact that the railway is not only a carrier of freight, but also of passengers, but make no distinction between the operation of branch lines or lateral lines and the main line of the railroad itself. All their argument is based upon the assumption that the Railway Company, when it constructed the spur track to the Ansted coal mine, assumed the absolute duty of carrying passengers over the same. This contention the Railway denies, and reasserting the propositions contained in its original brief, say:

1st. That in the construction of the Ansted branch line for freight purposes it did not assume to operate the same as a passenger road, and never held itself out to the public as engaged in operating such road as such; that the same was built as a branch line for coal switching purposes and not as a passenger road, and that it cannot be compelled to operate such road as a passenger road or install passenger service thereon;

2nd. That the order of the Public Service Commission of the State of West Virginia is unjust, unreasonable, confiscatory and amounts to taking of property of the Railway Company without just compensation being made; and,

3rd. That the construction placed upon the statute by the Public Service Commission and affirmed

by the Supreme Court of the State of West Virginia is not binding upon this Court.

ARGUMENT.

In the case of Olcott against Supervisors, 16 Wallace, 678, the Court holds:

> "This Court will follow as of obligations the decision of the State Courts only on local questions peculiar to themselves and of questions respecting their own constitutions and laws."

And, in Oregon R. R. and N. Co. vs. Fairchild et al, 224 U. S., 510, the Court held that an order of a Railroad Commission requiring a Railroad Company to expend money and use its property in a specified manner was a taking of property, and to be valid must be justified by public necessity and not unreasonable or arbitrary; and, in Chicago, Burlington & Quincy Railroad against Railroad Commissioners of Wisconsin, 237 U. S., 220, where an order of Railroad Commission required interstate trains to stop at certain stations, based not on its discretion but on requirements of State statutes, which has been sustained by State Courts as proper exercise of the power of the State, this Court held that it must pass upon the validity of the statute.

All regulations of the business of common carriers, whether taken in the form of regulating rates or of making track connections, must be reasonable, and the question of reasonableness is essentially a judicial question, which if not permitted by the law by which it is undertaken constitutes the taking of property without due process of law and amounts to denial of equal protection of the law.

Railroad Commission cases, 116 U. S., 307;
Chicago, etc. Railway vs. Minnesota, 134 U. S., 418;
Smyth v. Ames, 169 U. S., 466.

In view of these authorities we submit that the action of the State Supreme Court was not conclusive.

It is not the duty of the Railway Company in the operation of its lateral and branch roads to install passenger service and carry passengers over same, unless they have been built for that purpose and the company has held itself out as a carrier of passengers over such tracks.

The Constitution of the State of West Virginia provides:

> "Railroads heretofore or that may hereafter be constructed in this State are hereby declared public highways and shall be free to all persons for transportation of their persons and property thereon under such regulations as now are or may be prescribed by law."

While Section 71, Chapter 54, adds to these words:

> "But nothing in this section shall be construed to exempt any person from the payment of lawful charges for said transportation."

Section 69, Chapter 54, provides:

> "Any railroad organized under this Chapter may build and construct lateral and branch roads or tramways, and of any gauge whatever, not exceeding 50 miles in length, and may build planes and gravity

roads, use and operate any part or portion of their said main line and branch or branches when completed the same as though the whole of their said railroad was fully completed, and in the construction of their bridges across any river or navigable stream may provide for the passage of wagons or other travel, collecting tolls therefor as prescribed by law; and may erect and operate telegraph lines, with the right to use, control and operate the same along the lines of their said railroad and branches, and connecting with any of their said works, offices and improvements."

Section 69a VIII provides:

"Any lateral railroad suffered to remain unused for the period of two years, shall be considered as abandoned, and the right of way where the land was condemned shall revert to the original owner, or where obtained by contract, to the grantor, unless otherwise provided in the contract, etc."

Section 69a IX provides:

"Any railroad of the kind contemplated in this act, shall be deemed a lateral railroad and come within its operations, whenever any part of its roadbed has been condemned under and by virtue of the provisions of this statute."

SEC. 639. CODE OF WEST VIRGINIA—PUBLIC SERVICE CORPORATIONS.

Sec. 4: Every person, firm or corporation engaged in a public service business in this state shall establish and maintain adequate and suitable facili-

ties and shall perform such service in respect thereto as shall be reasonable, safe and sufficient, and in all respects just and fair. All charges, tolls, fares and rates shall be just and reasonable. Every railroad company shall permit switch connections for intrastate business to be made with its tracks at suitable and safe points, by other carriers or shippers, upon such terms and conditions as the commission may prescribe, whenever the business to be offered by the connecting company or shipper, in the judgment of the commission, justifies it. Every **railroad** and other transportation company may be required by the commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just; and to make reasonable connection with trains on branch lines of such railroads and with all connecting railroad lines; and may prescribe the number of men required to constitute safe crews for the handling of trains. (Acts 1913, c. 9, Sec. 4.)

SEC. 642. PREFERENCES, ETC., PROHIBITED.

Sec. 7. It shall be unlawful for any public service corporation subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular character of traffic or service, in any respect whatsoever, or to subject any particular person, firm, corporation, company or locality, or any particular character of traffic or service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (Acts 1913, c. 9, Sec. 7.)

SEC. 643. FACILITIES FOR TRAFFIC INTERCHANGE.

Sec. 8. All common carriers subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges or methods, or manner of service between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business.

Trunk lines, or principal railroads, shall, in the distribution of cars and the furnishing of facilities, treat industries and shippers, located on and tributary to lateral, industrial or tap lines, as if they were located directly on the track of the trunk lines or principal railroads, and not discriminate between such industries and shippers and those which may be located in direct proximity to their own tracks. And trunk lines or principal railroads shall allow and pay to the lateral, industrial or tap lines, a reasonable and equitable arbitrary or portion of the rate, consistent with the service rendered, giving due consideration to the fact that such lateral, industrial or tap line originates and assembles the freight. But nothing out of the main line rate shall be allowed the shipper or owner for the use of what may be termed "plant facilities." (Acts 1913, c. 9, Sec. 8.)

These are all of the provisions of the West Virginia Code applicable to the case at bar.

Under these provisions it is clear that where the State uses the word "railroad" it does not apply to lateral roads, branch roads, tramways or gravity roads, and that such roads may be constructed for either passenger or freight, or for both, but the question as to how these roads shall be constructed and used is to be decided by the railway itself, and where it constructs them for freight, it can only be used for that purpose, and where for passengers, it will not be compelled to carry freight. To be a common carrier of both passengers and freight upon such lateral branch or spur lines, the railroad must have held itself out as such, and if under its charter and the laws of the State of West Virginia it has not done so, it cannot be compelled to install passenger service on any line, spur or track constructed alone for freight purposes.

THE ORDER REQUIRING THE INSTALLATION OF A PASSENGER SERVICE UPON THE ANSTED TRACK WAS NOT JUSTIFIED BY PUBLIC NECESSITY; WAS UNREASONABLE; ARBITRARY, AND AMOUNTED TO THE TAKING OF PROPERTY WITHOUT THE PAYMENT OF JUST COMPENSATION.

In the case of State of Washington ex rel. Oregon R. R. and N. Company vs. Fairchild et al, 224 U. S., pg. 510, Justice Lamar, speaking for the Court, page 528 of the opinion, says:

> "Since the decision in Wisconsin &c R. R. v. Jacobson, 179 U. S., 287, there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean

that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in City, Town and Country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. For while the question of expense must always be considered (Chicago &c R. R. v. Tomkins, 176 U. S., 167, 174) the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But, even then the matter of expense is 'an important criteria to be taken into view in determining the reasonableness of the order.' Atlantic Coast Line R. R. v. North Carolina Commission, 206 U. S., 27; Missouri Pac. Ry. v. Kansas, 216 U. S., 262. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance."

Applying these facts to the case at bar, it is clearly not the absolute duty of a railroad company to operate a coal mine switch or siding 2½ miles long as a passenger railway, and the switch or spur

not having been built for the purpose of handling passengers, and the Railway Company never having held itself out as a carrier of passengers over such switch, it cannot be compelled to install passenger service over the same, but if the Commission should decide that it was the duty of the Railway Company to use such track for the carriage of passengers as well as of freight, then the question of the necessity for such use depends upon the public needs and requirements, and the question of expense necessary to convert the switch into and operate the same as a passenger road is specially important, and if there is not sufficient traffic over the road to pay the expense of running the trains, that is sufficient evidence that the public do not require it to be kept in operation.

The track is 2½ miles long, Ansted is 2 miles from the two nearest stations on the main line, while the average distance between stations on the main line is very much greater.

It is shown by the record that the entire receipts for one year preceding the filing of petition, at the two nearest stations to the town of Ansted was $8,747.00; total number of passengers was 9,422; or, about 25 per day; that in order to accommodate these passengers, if they all came from Ansted, the Railway was required in order to comply with the decision of the Commission to install adequate passenger service between stations of Ansted, Hawks Nest and MacDougal, said service to consist of not less than two passenger trains each way over said line daily; this, assuming that every passenger that embarked on the line at MacDougal and Hawks Nest returned to Ansted would give to the two trains over the road 12 passengers each way, the receipts

from which, at 2 cents per mile (the rate allowed by the law of the State of West Virginia), would be 60 cents; the cost to operate this road, as shown by the evidence would be about $12,000 per year, exclusive of interest, maintenance or other charges. If, instead of the passenger tickets sold at Hawks Nest and MacDougal, we take the estimate of the number of passengers that would travel over the road per day, as shown by the evidence, we have 35, which at 5 cents per passenger would be a total (receipts both ways) of $3.50 per day, to secure which, the Railroad must operate four trains and expend at least Five Dollars for every Dollar received.

To give passenger service to the people of Ansted at one-fifth of its actual cost, and to furnish trains to carry such passengers from their homes to the main line, would justify the residents along the main line in requiring the installation of passenger stations at a distance of every 2½ miles. But, the attorneys for the Public Service Commission insist that if the rate as fixed by the statute of West Virginia over railroads in the state at 2 cents per mile is unfair and unreasonable, that the Public Service Commission will correct it; our reply to that is that they have not corrected it, and that the statutes there, as in all cases, makes the distinction between branch lines and the main line, but requires that all branch line charges, where such branches are operated by railroads not over 50 miles in length, shall be subject to the same charges as the main line rates. Here, again, it is evident that the legislature understood that branch lines were not subject to the same law and statutory requirements as the main line, because in the two-cent rate act they expressly men-

tion branch lines, and fix the passenger traffic on such branches.

In the case of Northern Pac. Railroad v. North Dakota, 236 U. S., pg. 585, the Court held that a State could not segregate a commodity or class of traffic and compel a carrier to transport it at a loss without substantial compensation.

In Norfolk & Western Ry. Co. v. West Virginia, 236 U. S., pg. 605, the Court held that the two-cent a mile passenger rate was void and that a common carrier could not be required to transport a segregated commodity either at less than cost or for mere nominal consideration.

Applying the principles of these cases, the Railway Company insists that it cannot be compelled to operate the branch line for the transportation of passengers at a rate which will produce less than one-fifth of the actual cost of transportation; that the order requiring the installation of such passenger service is void, and amounts to denial of the equal protection of the law, and under the principles of the cases heretofore cited, should not be enforced.

All of which is respectfully submitted.

F. B. ENSLOW,

Attorney for The Chesapeake & Ohio Railway Company.

ENSLOW, FITZPATRICK & BAKER,

Counsel.

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BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA.

TRIBUNE PRINTING CO., CHARLESTON, W. VA.

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BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA.

STATEMENT OF THE PROCEEDINGS

On the 17th day of February, 1914, John Vawters and others, residents of the town of Ansted, Fayette County, West Virginia, as complainants, filed their complaint against the Chesapeake & Ohio Railway Company, before the Public Service Commission of West Virginia praying for the installation of passenger service upon a branch line of the Chesapeake & Ohio Railway Company, called the Ansted branch line, between the station of Ansted, on said branch line, and the stations of

Hawks Nest and MacDougal, on its main lines, respectively, all of said stations being situate in Fayette County, West Virginia.

Notice of said complaint was duly given to said Railway Company, and it thereupon filed its answer to said complaint. Both complainants and respondent submitted testimony before the said Public Service Commission, and after a full hearing and investigation, on the 3d day of June, 1914, the Commission made and entered of record its order therein, in which said order the Railway Company was directed within thirty days after the date thereof, to "install an adequate passenger service between the stations of Ansted, upon the Ansted branch line, and the stations of Hawks Nest and MacDougal, upon its main lines; said service to consist of not less than two passenger trains each way over said line daily;" the details of which said service were to be agreed upon between the Superintendent or other proper officer of the respondent Railway Company, and the Railway Inspector of the Commission, and to be submitted for the approval of the Commission.

On the 2d day of July, 1914, the Railway Company presented to the Supreme Court of Appeals of West Virginia its petition for an appeal from, and suspension of, said order of the Commission, which petition was duly allowed.

On the 13th day of October, 1914, upon a final hearing of the questions arising upon the said petition of the Railway Company, the Supreme Court of Appeals of West Virginia, for the reason set forth in its written opinion (Record, page 75) affirmed the said order of the Commission and dismissed the said petition of the Railway Company.

On the 1st day of December, 1914, the Railway Company presented to the Supreme Court of Appeals of West Virginia its petition for a Writ of Error from

the Supreme Court of the United States; on consideration of which said petition the Writ of Error prayed for was refused.

Thereupon, at the October Term 1914 of the Supreme Court of the United States, the Railway Company presented its petition to said Honorable Court for an allowance of a Writ of Error from said court to the Supreme Court of Appeals of West Virginia, which Writ of Error was duly allowed.

STATEMENT OF THE CASE

The Chesapeake & Ohio Railway Company is a corporation incorporated under the laws of the State of Virginia, and doing business in the State of West Virginia, and operating a trunk line railroad from the Virginia State Line through the State of West Virginia to the State Line of Kentucky.

About the year 1890 the Railway Company constructed what is known as its Ansted branch line, which is about three and one-third miles in total length, and which runs from Hawks Nest to the town of Ansted, in Fayette County, West Virginia, a distance of about two miles, and extends about one and one-third miles beyond said town. It was constructed primarily for the purpose of carrying coal from two mines, which mines, during the Fiscal Year 1913 of the Railway Company delivered to the Railway Company for carriage 242,280 tons of coal, and the freight revenue from the carrying of said coal received by the Railway Company for said Fiscal Year was $301,881.70.

Although frequently requested of the Railway Company by the people of the town of Ansted, no passenger service had ever been given upon said branch line, and the only freight service, other than that furnished for the carriage of coal from said mines, is local freight service given three times a week for the accommodation of the people living in the said town of Ansted and the territory tributary thereto.

The town of Ansted has a population of from 1200 to 1500 people, and, taking into consideration the territory tributary to said town, about 6000 persons would be accommodated by the installation of such passenger service.

It was admitted at the hearing before the Commission by Mr. J. R. Cary, General Superintendent of the Eastern General Division of the Railway Company, a

witness for the respondent Railway Company (Record, page 50), that it was practicable to furnish passenger service upon said branch line if it would pay; and it was further admitted at the said hearing before the Commission by Mr. C. W. Johns, Engineer of Branch Lines of the Railway Company (Record, pages 39 and 41), another witness for the respondent Railway Company, that the present condition of said branch line would warrant the operation of passenger trains over it, and that passenger service could, with safety, be afforded thereon.

The Railway Company estimated that it would cost $1,025.25 per month, or $12,303.00 per annum, to inaugurate such passenger service (Record, page 56). This estimate was predicated upon the purchase of a new engine and a new combination car; upon the employment of a watchman specially and solely for said branch line, and upon the employment of an engineer and fireman and a passenger train crew, in addition to the engineer and fireman and the train crew now performing frieght service upon said branch line; and further, upon the theory that said branch line would be operated independently of the main lines. The Railway Company further estimated that the receipts from such passenger service would amount to about $200.00 per month, or $2,400.00 per annum, but admitted through Mr. C. H. Terrell, its Assistant Superintendent of Motive Power, testifying as a witness before the Commission, and who submitted said estimates (Record, page 57), that if such passenger service were inaugurated, although it was not to be anticipated, it might cover the monthly cost of such passenger service as estimated by him.

The Commission was of the opinion (Record, page 73) that no such elaborate system of passenger service as that upon which said estimates were based was

necessary or required to accommodate the needs and convenience of the people of Ansted.

The nearest stations on the main lines of the Railway Company to the town of Ansted are Hawks Nest, on its East bound line, about two miles distant, and MacDougal, on its West bound line, about two and one-half miles distant, which stations at the present time are only accessible to the people of Ansted, and vicinity, over a rough, hilly and difficult mountain road.

It appears from the testimony before the Commission that for the Fiscal Year 1913 of the Railway Company, Hawks Nest station accommodated 7,262 out-going passengers, and that the Railway Company derived a revenue therefrom amounting to $4,752.78; and that for said Fiscal Year MacDougal station accommodated 5,452 out-going passengers, and that the Railway Company derived a revenue therefrom amounting to $3,100.7; and that from ninety to ninety-five per cent of the said passenger business from these two stations originated at Ansted.

ARGUMENT

It is urged by the plaintiff in error that the final judgment of the Supreme Court of Appeals of West Virginia should be reversed and that the operation of the order of the Public Service Commission of West Virginia should be suspended for the following reasons:

(1) Because the Public Service Commission of West Virginia erroneously construed and applied Section 4, Chapter 9, of the Acts of the Legislature of West Virginia, 1913, Serial Section 639, Code of West Virginia, 1913;

(2) Because the said order is in violation of the Federal Constitution in that said order is confiscatory and denies to the plaintiff in error the equal protection of the laws.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA DID NOT ERRONEOUSLY CONSTRUE AND APPLY SECTION 4, CHAPTER 9, OF THE ACTS OF THE LEGISLATURE OF WEST VIRGINIA, 1913.

Section 4, Chapter 9, of the Acts of the Legislature of West Virginia, 1913, reads as follows:

> "Every person, firm or corporation engaged in a public service business in this estate shall establish and maintain adequate and suitable facilities and shall perform such service in respect thereto as shall be reasonable, safe and sufficient, and in all respects just and fair. All charges, tolls, fares and rates shall be just and reasonable. Every railroad company shall permit switch connections for intrastate business to be made with its tracks at suitable and safe points, by other carriers or shippers, upon such terms and conditions as the commission may

> prescribe, whenever the business to be offered by the connecting company or shipper, in the judgment of the commission, justifies it. Every railroad and other transportation company may be required by the commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just; and to make reasonable connections with trains on branch lines of such railroads and with all connecting railroad lines; and may prescribe the number of men required to constitute safe crews for the handling of trains."

This section was construed by the Supreme Court of Appeals of West Virginia contrary to the contention of the plaintiff in error, and said court held that under the provisions of said section the power and authority existed in the Public Service Commission of West Virginia to order the installation of passenger service upon a branch line of a railroad company operating a railroad within the State of West Virginia, even though such service had not previously been installed.

The construction given to it by the highest judicial tribunal of the State of West Virginia is regarded as a part of the statute and is binding upon the courts of the United States as to its proper construction; and your Honorable Court accepts the construction so given to it by said court as being conclusive; and as to what should be regarded as among its terms no Federal question can arise.

Smiley vs. Kansas, 196 U. S. 447;

St. Louis I. M. S. & R. Co. vs. Paul, 173 U. S 404, 408;

Morley vs Lake Shore & M. S. R. Co., 146 U. S. 162.

THE ORDER OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA IS REASONABLE AND IS CONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES.

In the first place, it is the primary duty of a railroad company to furnish adequate and reasonable passenger and freight train service to its local territory and for the convenience of the people thereof.

Illinois C. R. Co. vs. Illinois, 163 U. S. 142;
Cleveland C. C. & St. L. R. Co. vs. Illinois, 177 U. S 514;
Illinois C. R. Co. vs. Mississippi R. Com., 203 U. U. S. 335;
Lake Shore & M. S. R. Co., vs. Ohio, 173 U. S. 285.

In the second place, at Common Law, in the absence of a constitutional provision, or a statute, railroad companies, being organized for public purposes, and having been granted valuable franchises and privileges, such as the right of eminent domain, owe to the public the duty and obligation of providing and maintaining reasonable and suitable facilities for the transportation of both persons and freight.

Alcott vs. Supervisors, 16 Wall 678;
Southern Pacific Co. vs. Commission, 119 Pac. 727;
Mills, Em. Domain, Sec. 14.

In *U. S. vs. Trans-Missouri Freight Association*, 166 U. S. 290, at page 332, it is stated:

"It must also be remembered that railways are public corporations organized for public purposes, granted valuable franchises and privileges, among

> which the right to take the private property of the citizen *in invitum* is not the least * * *; and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their share holders. The business which the railroads do is of a public nature closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer, and the trader."

In the third place, it is provided by *Sec. 9 Art. 11. of the Constitution of West Virginia:*

> "Railroads heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law."

The same language appears in *Section 71, Ch. 54, Code of W. Va., 1913.*

Although the Chesapeake & Ohio Railway Company was incorporated under the laws of Virginia, it was and is doing business in West Virginia by her comity; it is for all purposes a domestic corporation and is subject to her Constitution and laws. When it constructed the Ansted branch line the before mentioned provisions of the Constitution and Code of West Virginia were in full force and effect, and it then and there became its duty and obligation to comply with the terms thereof, as construed and interpreted by the highest judicial tribunal of West Virginia, as to the transportation of persons as well as property thereon; and, further, its inherent obligation was to afford passenger service upon its said branch line without any direction or order from the Public Service Commission of the State of West Virginia.

The consideration for the rights and privileges granted to it by the state is the resulting benefits to the public and the acceptance of such rights and privileges by the Railway Company imposed upon it the obligation to operate when constructed the Ansted branch line both for passengers and freight. Further, the Railway Company accepted the privilege of doing business within the State of West Virginia subject to, and with full knowledge of, her Constitution and laws. It constructed the Ansted branch line in pursuance of the laws of the state of West Virginia, and particularly those relating to eminent domain. And before doing any business in the State of West Virginia, it expressly consented to abide by the Constitution and laws of the State, not in violation of the Supreme law of the land.

In *Lake Shore & M. S. R. Co. vs. Ohio*, 173 U. S. 285, this Honorable Court said:

> "Such railroad accepts its charter subject to the condition that it would conform to such reasonable state regulations as were for the public interest and not in violation of the supreme law of the land."

In *Missouri P. R. Co. vs. Kansas*, 216 U. S. 262, where the court had under consideration an order of the State Board of Railroad Commissioners, which order directed the putting in operation of a passenger train service over a branch line of the Missouri Pacific Railway Company within the State of Kansas, and which said order of said Board of Railroad Commissioners was upheld, this Honorable Court, speaking through Mr. Justice White, quoted from *Atlantic Coast Line Railway Company vs. The N. C. Corp Com.*, 206 U. S. 1, as follows:

> "This is so (the distinction) because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may be well compelled, although by doing so, as an incident, some pecuniary

> loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth vs. Ames*, 169 U. S. 526."

This Honorable Court, in that case, further speaking through Mr. Justice White, also said:

> "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

In the fourth place, the town of Ansted has no railroad service other than that afforded by the Chesapeake & Ohio Railway Company; and the passenger service now afforded it is grossly inadequate and unjust.

In the fifth place, it is respectfully urged that said order of the Commission is reasonable, fair and just upon its face, and the passenger service provided for therein, not having been tried out, it is problematical whether it will result in much, if any, pecuniary loss to the Railway Company.

In the sixth place, public demand, necessity and convenience require reasonable passenger service to be furnished to the people of the town of Ansted and vicinity; and such demand. necessity and convenience authorize, and the greater advantage to the public overcomes, the pecuniary loss, if any, to the Railway Company.

hearing before the Commission to show that the installation and maintenance of passenger service upon the Ansted branch line would have the effect of causing a loss to the Railway Company when considered in connection with its entire intrastate passenger traffic. The claim of pecuniary loss made by the Railway Company is limited to the operation of passenger service upon said Ansted branch line. The Railway Company, by the order of the Commission, is simply required to perform a duty and obligation which it was required to perform by the Constitution and laws of West Virginia. It is not called upon to perform an extra service, but to perform a service to which it consented and agreed many years ago when it constructed the Ansted branch line, and one within the scope of its undertaking.

The possibility that the passenger service ordered by the Commission may cause some pecuniary loss to the carrier is not alone sufficient to prove it to be confiscatory. In order to determine that question the Railway Company's entire intrastate earnings from its passenger traffic, must be taken into account.

Atlantic Coast Line vs. N. C. Corp. Com., 206 U. S. 1;

Chicago B. & Q. vs. Wisc. Railroad Com., 237 U. S. 220.

Your Honorable Court has held that where an additional facility is required which is not one of the carrier's ab-

solute duties, then the matter of expense is of controlling importance. *Oregon R. R. & N. Co. vs. Fairchild*, 224 U. S. 510 It is our position that the decision in that case is not applicable to the instant case because it is the absolute duty of the Railway Company to furnish both passenger and freight service on its branch lines as well as on its main lines, where there is a public necessity therefor and the public convenience will be greatly accommodated thereby.

In *C. B. & Q. Railway Co. vs. Wis. Railroad Com.*, 237 U. S 220, where the requirement that every village having two hundred or more inhabitants and a post office, and being within one-eighth of a mile of a railway, must be given by such railway the accommodation of at least two passenger trains each way each day, if four or more passenger trains are run each way daily, without regard to the adequacy of the existing passenger service afforded such stations, this Honorable Court said:

> "And in mentioning the expense, we do not wish to intimate that expense is determining, but only to be considered A railroad cannot escape a duty by pleading the expense of its performance."

In *Colo. & Southern Ry. Co. vs. The State Railroad Com. et al.*, 54 Colo.. 64, where the court had under consideration an order of the State Railroad Commission of Colorado, which order required the Railway Company to resume the operation of a particular branch or part of its railroad which it had abandoned, the court sustained the order of the Commission and held: the railway company claiming that the operation of a particular branch or part of its railway will be unprofitable has the burden of proof; that a railway company may, where the public interests require, be compelled to resume the operation of a part of its constructed line which it has abandoned, even though in fact such operation

may be at a loss; and, further, the question of loss must be considered in connection with the duties of the railway company to the public, and the result of its corporate business, as a whole; and that it was not to be excused from performing its whole duty merely because by ceasing to operate a part of its system the net returns will be increased.

In the opinion in this case appear the following pertinent statements:

> "The law imposes upon it the duty of furnishing adequate facilities to the public on its entire system, not a part; and it cannot be excused from performing its full duty merely because, by ceasing to operate a part of its system, the net returns would be increased; so that it cannot be said, under the facts, that requiring plaintiff in error to perform its duty to the public by furnishing an adequate service over its line between Denver and Leadville, although a pecuniary loss is entailed, is unreasonable or deprives it of any constitutional right, either federal or state. *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262; *Atl. Coast Line R. R. Co. v. N. C. Corp. Com.*, 206 U. S. 1; *Corporation Com. v. R. R.*, 137 N. C. 1."
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> "Merely requiring the railroad company to observe the obligations which the law imposes upon it to reasonably serve the public, by either the terms of the Railroad Commission Act, or the order of the commission, by virtue of the authority vested in them, is nothing more than requiring it to comply with its legal obligations. This does not invade any constitutional right, neither does it work an injustice to the incorporators."

In *Steward vs. Denver, R. G. R. Co.*, 131 Pac. 980, it is held:

> "So long as a railroad company continues to exercise its charter rights, it will be required to perform its duties to the public, even though such performance entails a pecuniary loss."

In *Webster vs. C. & N. W. R. Co.*, 10 Wis. R. Com. Rep. 500, at page 508, we find this statement:

> "If, as the commission has held in speaking of branch service (*Nelson et al vs. N. C. R. R. Co.*, 1912, 8 W. R. C. R. 685) every part of a railroad system cannot be expected to be profitable, and a railway company is generally in duty bound to furnish reasonably adequate service, regardless of cost. It, of course, shows strongly that under certain circumstances, on a branch whose business has increased the adequate service to the public may make it necessary for a railroad to operate a train which is not particularly profitable or even entails some loss."

In *Nelson vs. Ry. Co.*, 8 Wis. R. Com. Rep. 685, we find this principle laid down:

> "Segregating a branch line of a railway system for the purpose of ascertaining the cost of operation as a factor in the basis upon which to predicate the amount of service that should be rendered on such line, is a legitimate and proper method of arriving at one of the important, but not necessarily controlling, elements in determining the amount of service reasonably required to subserve the public convenience. Every part of a railroad system cannot be expected to be profitable. There are many short lines acting as feeders to main lines, which could not be operated independently of the main line. In determining the reasonableness of any branch line, service, the relation of the branch line to the system as a whole, the

needs of the public tributary to the branch, the character and volume of the traffic, both present and prospective, the cost of operation and its effect upon the revenues of the entire system must be considered, and every factor given such weight as in the light of all the circumstances the situation warrants. A railway company is generally in duty bound to furnish reasonably adequate service, regardless of cost, and there is a minimum of service that must be rendered on every line, less than which would be a breach of public duty on the part of the carrier."

In *Meyer vs. Rib Lake Lumber Co. et al*, 7 Wis. R. Com. Rep. 401, appears this language:

"While the branch line may not be a paying proposition at present, it is an integral part of the railway system, and cannot be abandoned so long as the operating revenues of the entire system are adequate to meet all of the requirements."

We cite the following additional authorities in support of our contention that, in no case, is expense determining or controlling; *Smyth vs. Ames*, 169 U. S. 466; *Railway Co. vs. Gill*, 156 U. S. 649; *Railroad Co. vs. Com.*, 58 So. (La.) 862; *State vs. Railway Co.*, 239 Mo. 196; *Coms. vs. Railway Co.*, 7 Int. Com. R. 69; *Brabham vs. Railway Co.*, 11 Int. Com. R. 464; *Railroad Co. vs. Philadelphia County*, 220 Pa. 100.

It seems to us that the principles established by the foregoing cases are conclusive that the order of the Commission is not confiscatory and does not deny the Railway Company the equal protection of the Laws, even though the Railway Company might suffer some pecuniary loss from the installation and operation of passenger service upon its Ansted branch line. However, we do not admit that the inauguration and opera-

tion of passenger service on this branch line would be at a loss; on the contrary, if operated by the same engineer, fireman and crew which now take care of the freight service on said branch line we think that the operation of passenger service thereon should, in a reasonable time at least, be profitable; but even though it should not be profitable, we contend with great earnestness that the service must be rendered, because it is a public necessity and convenience, required by the Constitution and laws of West Virginia, and so far as the record in this case discloses, the Railway Company's intrastate passenger business in West Virginia is profitable.

The distinguished counsel for the Railway Company seem to construe the principles laid down in *Northern P. R. Co. vs. North Dakota*, 236 U. S. 585, and in *Norfolk & Western Ry. Co. vs. West Va.*, 236 U. S. 605, as contravening the principles enunciated in the cases hereinbefore cited. They take the position that while the property of the Railway Company is devoted to public use, on certain terms, that does not justify the requirement that it should be devoted to other public purposes, or to the same use on other terms.

They cite the *North Dakota* case in their brief as an authority for the position, that if the Railway Company has held itself out as a "carrier of passengers only" it cannot be compelled to carry freight. We do not controvert this principle, but say that it is irrelevant and inapplicable to the present case. The Railway Company is not only a carrier of freight, but is also a carrier of passengers, and so holds itself out; and being a carrier of both passengers and freight it cannot, on one part of its system, refuse to carry passengers, or on another part of its system, refuse to carry freight. If it held itself out only as a carrier of freight, but for the Constitution of West Virginia, it could not be compelled

to carry passengers in West Virginia, and of course the reverse of this proposition is true. But the Chesapeake & Ohio Railway Company is a public carrier of both passengers and freight, and so holds itself out to be, and therefore it must perform its duty and obligation to the public in this connection on every part of its system in West Virginia. This would necessarily be true in the absence of a constitutional provision or statute such as they have in West Virginia, the provisions of which were assented to by the Railway Company in constructing its railroad system in West Virginia, and particularly the branch line under discussion.

The Railway Company cannot limit its duty or obligation to the public by saying that as to a part of its system in West Virginia, it will carry freight only, as to another part of its system in West Virginia, it will carry passengers only, and as to another part of its system in West Virginia, it will carry both passengers and freight. Such a position would be fundamentally and logically wrong.

We do not think that the North Dakota, Norfolk & Western, and other cases cited by the distinguished counsel for the Railroad Company are at all relevant or applicable to the facts of the instant case. On the contrary, we think that the *North Dakota* case is a complete authority for the principle that we are earnestly contending for, namely, that a railroad company does not have to be assured of a net profit on its passenger or freight service from every division, section, branch line, mile or other part into which the road is, or might be, divided, particularly the following language from the opinion therein:

> "In *St. Louis & San Francisco R. Co. vs. Gill*, 156 U. S. 649, a statute fixing a maximum rate for passengers in the state of Arkansas was challenged, but

the allegation and offer of proof that the rate would compel the carriage of passengers at a loss related only to a portion, or division of the railroad, and not to the result of all traffic to which the rate in question applied. The holding that this was insufficient was in entire accord with the above stated principle—that the rate-making power may be exercised in a practical way, and that the legislature is not bound to assure a net profit from 'every mile, section, or other part into which the road might be divided.' Id. p. 665. A passenger rate may apply generally throughout the state, and the effect of the rate must be considered with respect to the whole business governed by the rate."

We have not discussed the question of the rates to be charged upon the Ansted branch line for the passenger service required by the order of the Commission, discussed at page 5 of the brief of the distinguished counsel for the plaintiff in error, for two reasons—first, that no such question was presented to the Public Service Commission or to the Supreme Court of Appeals of West Virginia, nor did either of these tribunals consider or pass upon the question,—and secondly, for the reason that the power or authority of the Commission over intrastate passenger rates in West Virginia is no longer an open question, it having been decided by the Supreme Court of Appeals of West Virginia in *State ex rel. Public Service Com. vs. Baltimore & Ohio R. R. Co.*, 85 S. E. Rep. 714 that the Commission upon application by the carrier or by some one injuriously affected thereby, or upon its own initiative, has the authority to investigate and determine whether the so-called West Virginia Two Cent Passenger Rate as fixed by an Act of the Legislature of West Virginia is unreasonable or confiscatory as to a particular carrier, and therefore in-

valid; and to prescribe reasonable maximum rates for the carrying of intrastate passengers and baggage.

For these reasons we most respectfully submit that this Honorable Court should affirm the judgment of the Supreme Court of Appeals of West Virginia and uphold the order of the Public Service Commission of West Virginia.

Respectfully submitted,

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